In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1045

JOHN E. MOSS, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

On August 3, 1972, the Federal Power Commission, as part of its continuing effort to alleviate the worsening shortage of natural gas, issued Order No. 455 (FPC Pet. App. 31a-51a)[1] establishing an "optional procedure for certificating new producer sales of natural gas" (*id.* at 31a). The purposes of the order and the structure of the optional certification procedure that it establishes are described in the Commission's petition for a writ of certiorari (pp. 2-5).

The court of appeals affirmed the Commission's order in all respects except one (FPC Pet. App. 1a-27a). It held that the order did not abandon the statutory "just

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[1]"FPC Pet." refers to the Commission's petition for a writ of certiorari in No. 74-883.

and reasonable" standard for consideration of proposed rates under the optional certificate procedure (*id.* at 8a-11a); that the Commission may at the outset properly review and approve as just and reasonable both an initial rate and any fixed rate escalations provided for in the contract (*id.* at 11a-14a); and that the Commission may, pending final action on an application, properly authorize the temporary delivery of gas under a contract at the prevailing area ceiling rate for a period of six months, and at the contract rate thereafter, without subjecting the producer to the risk of refund obligations (*id.* at 14a-16a).

The court set aside the Commission's order, however, insofar as it provides that the Commission may, at the time it issues a certificate of public convenience and necessity, authorize the producer to terminate the sale at the end of the contract term (*id.* at 20a-21a). The Commission's petition for a writ of certiorari (No. 74-883) seeks review of the court's judgment with respect to that single, discrete question. The present petition, which seeks review of the same judgment with respect to several other issues, is conditioned upon the Court's granting of the Commission's petition (Pet. 1, 8).

1. The cross-petition should be denied as untimely. The judgment of the court of appeals was entered on August 15, 1974 (FPC Pet. App. 28a), and timely petitions for rehearing were denied on September 19, 1974 (*id.* at 29a-30a). On December 12, 1974, the Chief Justice extended the Commission's time for filing a petition for a writ of certiorari to and including January 17, 1975, and the Commission's petition was filed on that date. The cross-petitioners sought no extension of time, and their cross-petition was not filed until February 20, 1975—154 days after the court of appeals' denial of rehearing. The cross-petition is therefore out-of-time under 28 U.S.C. 2101(c).

The 90-day statutory period for the filing of a petition for a writ of certiorari in a civil case is jurisdictional. See *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206; *Department of Banking* v. *Pink*, 317 U.S. 264. Neither the statute nor this Court's Rules make any exception for cross-petitions.

Petitioners assert (Pet. 2) that "[t]he procedure followed by cross-petitioners [*i.e.*, filing a conditional cross-petition more than 90 days after the denial of rehearing] conforms to the procedure approved by this Court in *Ray* v. *Pierson*, cert. granted, 384 U.S. 938." Although the Court there granted an apparently out-of-time cross-petition, the cross-respondents did not suggest any jurisdictional defect in the cross-petition, and this Court did not address the issue either in its order granting certiorari or in its subsequent opinion in the case (*Pierson* v. *Ray*, 386 U.S. 547).[2]

Moreover, the cross-petition here presents no issue that can reasonably be viewed as subsumed in the single question presented by the Commission's timely petition. Though cross-petitioners cast their question presented in

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[2]Although the current edition of Stern and Gressman, *Supreme Court Practice* (1969), notes that *Pierson* v. *Ray* appears to depart from the normal practice, it reiterates that conditional cross-petitions usually must be filed within the statutory time period. "Normally, a cross-petitioner who seeks review only if the original petition is granted is subject to the same time requirements as the petitioner and must file his cross-petition within the same required time (usually 90 days) or obtain an extension of time in which to file the cross-petition, quite apart from what the petitioner may do in this respect" (p. 311).

Cross-petitioners also cite *Texaco, Inc.* v. *Federal Power Commission*, 391 U.S. 916, and 391 U.S. 918, as support for the practice of filing untimely cross-petitions. It is true that untimely cross-petitions were filed in those cases. But they were opposed by the Solicitor General in part because of their untimeliness, and this Court denied both cross-petitions.

a form that suggests an inter-connection with the pre-granted abandonment issue presented by the Commission, their contentions in fact relate solely to other aspects of the Commission's order establishing the optional certificate procedure. The Commission's authority simultaneously to certificate a jurisdictional sale of natural gas and approve the future discontinuance of that sale is a discrete issue that can be resolved without consideration of the quite different issues raised in the cross-petition.

Even if this Court determines that the untimeliness of a cross-petition is not a jurisdictional defect and that the Court may in its discretion consider an out-of-time cross-petition on its merits, we submit that, in the absence of a Rule of this Court to the contrary, that discretion should be exercised only in exceptional circumstances where good cause is shown for the delay. There are no such exceptional circumstances here. The cross-petitioners' only explanation for their delay is that they previously thought certiorari was not essential on the issues they raise, that they now believe the question presented by the Commission's petition "cannot meaningfully be considered in isolation from the other issues," and that "the necessity for the instant conditional cross-petition did not arise until *after* the filing of the Commission's petition" (Pet. 2; emphasis in original).

That claim, however, could be made in every conditional cross-petition and hardly amounts to a showing of exceptional circumstances. Many conditional cross-petitions are filed in this Court within the statutory period, and the cross-petitioners here have not explained why that was not feasible in this case.

2. In any event, the cross-petition presents no issue warranting review by this Court. Each of the cross-petitioners' contentions was correctly rejected by the court of appeals in accordance with settled principles, and none of those contentions need be considered by this Court in order meaningfully to consider the pre-granted abandonment issue presented by the Commission's petition.

Cross-petitioners attack the optional certificate procedure on three grounds. First, they contend that the procedure "was intended to provide producers with a higher than just-and-reasonable price" (Pet. 5). The optional procedure regulation, however, provides on its face that the Commission will certificate a sale only upon a "determination that the rates, charges and services * * * are just, reasonable and required by the present and future public convenience and necessity" (FPC Pet. App. 47a). The Commission's orders also emphasized its intention "to examine the justness and reasonableness of proposed rates" (*id.* at 36a). "Certification will be subject to the standards of 'just and reasonable' in Section 4" (*id.* at 53a), and "[t]here certainly must be some evidentiary basis proferred [*sic*] by the seller-applicant upon which we can judge whether the contract rate is just and reasonable" (*id.* at 42a).

Cross-petitioners' reliance upon *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380, is therefore inappropriate. The Court there held that the Commission could properly regulate the rates of small producers indirectly by reviewing the purchased-gas costs of pipelines when they seek to pass on to consumers the cost of gas purchased from small producers. The Court found the Commission's order defective only because it

did not unambiguously provide—as the present order does—that the small producers' rates would be reviewed under the statutory just and reasonable standard.[3]

Second, cross-petitioners contend that the Commission may not allow producers to collect the contract rate, pending final Commission action, without subjecting the producers to the risk of refund liability if the rate is later found to be excessive. Order No. 455 provides that, pending action by the Commission, a producer may deliver gas to the purchaser at a rate "no higher than the prevailing area ceiling rate" (FPC Pet. App. 48a) for a period of six months. Thereafter, if the Commission still has not taken action on the application, the pro-

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[3]The Court also stated in *Texaco* that, while the prevailing market price of gas "may certainly be taken into account along with other factors" (417 U.S. at 399), it "cannot be the final measure of 'just and reasonable' rates mandated by the Act" (*id.* at 397). Contrary to cross-petitioners' suggestion (Pet. 7), nothing in the optional procedure orders makes market price "the final measure of 'just and reasonable' rates." The Commission stated that it would consider market prices in determining whether the contract rate is just and reasonable, but it also expressly denied that it would rely "solely upon 'market conditions' " (FPC Pet. App. 53a). The orders impose upon the applicant the burden of providing evidentiary support for the proposed rate (*id.* at 42a, 47a, 53a), and they require the proposed purchaser to submit detailed information concerning its existing and future supply of and demand for natural gas (*id.* at 42a, 47a). The Commission stated that this "data will be necessary to properly judge the merits of the contract, and to make a determination of the propriety of the contract rate" (*id.* at 42a). The Commission also indicated that it would take into account the producer's costs (*ibid.*). The orders thus demonstrate that the Commission "exercise[d] its discretion within the limits of the standards expressed by the Act" (*Texaco, supra*, 417 U.S. at 396).

ducer may, upon the filing of a notice of rate change, begin collecting the contract rate "without refund obligation" (*ibid.*).[4]

This Court held in *Texaco* that "the Commission retains [discretion] under §4(e) of the Act * * * to refrain from imposing a refund obligation" in appropriate cases (417 U.S. at 392). See also *Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283, 321-325. The Commission did not abuse that discretion here. The Commission reasoned that the provision authorizing collection of the contract rate is not likely to come into play frequently, because the Commission will in most cases issue a final order within the six-month period (FPC Pet. App. 44a).[5] Order No. 455 thus reflects a reasonable determination that, in the minority of cases in which final action is delayed beyond six months, the need for rate certainty justifies permitting the producer to collect the contract rate without risk of refund liability. Cross-petitioners may dispute the wisdom of that determination, but they have not shown that the Commission's assessment of the public interest is improper.

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[4]The Commission subsequently established a uniform national ceiling rate, superseding the area ceiling rates, for sales of natural gas produced from wells commenced on or after January 1, 1973, or newly dedicated to interstate commerce on or after that date (Opinion No. 699, issued June 21, 1974). The Commission thereafter issued Order No. 455-B amending the optional certificate procedure to permit the initial delivery of gas at a rate no higher than the prevailing national ceiling rate and to authorize collection of the contract rate after nine months instead of six months.

[5]The Commission later determined that six months was not in every case a long enough period to permit final disposition of optional procedure applications, and it accordingly extended the period to nine months (see note 4, *supra*).

Third, cross-petitioners appear to argue that the Commission may not properly approve, at the time of certification, fixed rate escalations provided for by the contract. As the court of appeals correctly held, however, nothing in the Act precludes the Commission from making "an advance determination of 'reasonableness' in proceedings under Section 4" (FPC Pet. App. 13a). "Whether [the Commission] succeeds will depend upon the evidentiary basis for the escalations proposed in a given contract and the reasonableness of Commission findings and projections supporting and approving such escalations. The question is one of proof which can be answered only on a record setting out a particular proposal and the evidence supporting it" (*id.* at 13a-14a).

It is therefore respectfully submitted that the conditional cross-petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DREXEL D. JOURNEY,
General Counsel,
Federal Power Commission.

MAY 1975.